Pregnant Persons as a Gender Category

A Trans Feminist Analysis of Pregnancy Discrimination

Ding

Abstract. How should we make sense of pregnancy discrimination as an issue of gender equality? In a striking 1974 decision, *Geduldig v. Aiello*, the U.S. Supreme Court has answered that we simply cannot. Pregnancy discrimination does not constitute a form of sex discrimination prohibited by law, the 6–3 decision claims, because differential treatment based on pregnancy draws only a gender-neutral line between "pregnant women" and "nonpregnant persons," not the gender line between women and men. While courts have since invoked *Geduldig* to curtail both reproductive and transgender rights, the prevailing feminist response to this line of cases is still to double down on an awkwardly cissexist conception of gender, finding the sex discrimination in the "direct" way that pregnancy is thought to connect to womanhood. The failure of that prevailing feminist response, legitimizing rather than challenging biological essentialism in legal analysis and public discourse, epitomizes a broader failure of feminist analysis and intersectional solidarity: it fails to confront the political and social problem that is pregnancy discrimination for either cis or trans people. This essay offers a trans feminist alternative. I argue that pregnancy discrimination is discrimination on the basis of sex, within the legally relevant meaning of that phrase, not because pregnancy is in one way or another distinctive to women as a gender category but because pregnant persons make up a gender category of their own. On my analysis, pregnancy discrimination comes out as a form of sex discrimination directly and immediately, not by way of womanhood.

Since 1974, the United States Supreme Court has recognized a constitutionally significant distinction between discrimination against *women* and discrimination against *pregnant persons*—for all the wrong reasons, and reaching all the wrong results. Upholding the State of California's refusal to cover uncomplicated pregnancies under its otherwise comprehensive workers' short-term disability insurance program, the Court held in *Geduldig v. Aiello* that differential treatment based on pregnancy is not in and of itself a form of sex discrimination within the meaning of American gender equality law. Writing for a 6–3 majority, Justice Potter

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Stewart explained that this is because pregnancy as a "physical condition" is itself neutral on sex and fails to carve the social world at the gender seam between women and men. "The lack of identity between the excluded disability [i.e., pregnancy] and gender as such under this insurance program becomes clear upon the most cursory analysis," Justice Stewart claimed. "The program divides potential recipients into two groups—*pregnant women* and *nonpregnant persons*. While the first group is exclusively female, the second includes members of both sexes."[1] The argument is breathtaking: On the assumption that pregnancy is unique but not universal to women as a gender category, treating pregnant persons differently from nonpregnant persons (i.e., pregnancy discrimination) is not the same as treating women differently from men (i.e., sex discrimination). So, assuming that pregnancy disability coverage is neither afforded to any men nor available to all women, its denial imposes "no risk from which men are protected and women are not" and therefore "does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities," evading constitutional requirements of gender equality on pain of committing a category mistake.[2]

It's not hard to imagine why this "pregnancy discrimination is not sex discrimination" argument from *Geduldig* has been so widely "reviled" (Fontana and Schoenbaum 2019, 331n130) that even critiquing the decision has turned into "a cottage industry" of its own (Law 1984, 983). I'm with those who view *Geduldig* as wrong not just at the level of normative theory but as a matter of equal protection doctrine. As a trans feminist, though, I've always felt that there is something powerful—and something

1. Geduldig v. Aiello, 417 U.S. 484, 496–97 n.20 (1974) (my emphasis). Readers new to thinking about gender equality in relation to the law may wonder what hinges on whether pregnancy discrimination constitutes a form of sex discrimination to begin with. First, *doctrinally*, under American constitutional law, sex discrimination receives "heightened scrutiny" as compared to discrimination on the basis of facially neutral characteristics. Second, *normatively*, sex discrimination gives rise to a *prima facie* complaint against gender inequality that goes beyond mere setbacks in liberty, autonomy, and well-being. And last but not least, *explanatorily*, sex discrimination, as experienced by those on its receiving end, cannot be fully captured in facially neutral terms.

2. *Id.* at 496–97. Ostensibly, the Court left open a possibility that in certain as-applied challenges pregnancy exclusions might be revealed as sex discrimination in disguise if it could somehow be shown that they "are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other." *Id.* at 496–97 n.20. But that is already to assume that discrimination based on pregnancy is not *ipso facto* on the basis of sex. Indeed, if even a sole, specific, and targeted exclusion of pregnancy coverage is not code for "invidious" sex discrimination, plaintiffs really need a miracle and then some more just to be in a position to make a showing of pretext. Because I think of the pretext exception as a caveat without much of a difference, I will for the most part omit '*ipso facto*,' 'in and of itself,' and similar qualifiers from here on. For two contrasting readings, see Fontana and Schoenbaum (2019, 357–58) and Eyer (2023, 487–89).

right, if only for the wrong reasons—in the realization that pregnancy discrimination needs to be analyzed as discrimination against pregnant persons *as such*. Current public discussions of a trans-affirming approach to reproductive justice underscore the liberatory potential of the analytical category *pregnant persons*, and I want to reclaim it for trans people on our own terms. The challenge is how then to show that pregnancy discrimination still raises constitutionally cognizable complaints against gender inequality without routing it in one way or another through womanhood. I take this to be the sign of a broader problem: underlying *Geduldig*'s argument is a deep conceptual confusion about the relationship between sex, gender, and reproductive biology—one that has never been adequately confronted, never mind successfully resolved, whose consequences continue to haunt feminists to this day.

Today in the United States, the constitutional guarantee of gender equality is understood to be found in the Fourteenth Amendment's requirement that the state may not "deny to any person within its jurisdiction the equal protection of the laws."[3] That phrase of art—the Equal Protection Clause, as it is known—was first acknowledged by the Supreme Court in 1971 to extend to discrimination on the basis of sex.[4] The Court has since conceptualized sex discrimination by way of a delicate (mis)match between differences in social treatment and differences in reproductive biology. This is a two-step analysis: In any given case, the Court first asks whether women and men are treated *differently* due to reproductive biology; if so, there is discrimination and it is based on sex. Then, the Court asks whether the sex discrimination is nonetheless *justified* by a real underlying "biological difference"; if so, there is no violation of the Equal Protection Clause. Thus, when American immigration law automatically confers citizenship on children born abroad to unmarried U.S. citizen mothers but not fathers, the Court first acknowledges that the law discriminates on the basis of sex, only then to affirm its constitutionality by appeal to the "biological inevitability" of "the proof of motherhood"—but not fatherhood—"that is inherent in birth itself." This difference on the biological level, we are told by a five-men majority, justifies a "real concern" on the social level of citizenship having to be granted to children fathered the world over by American men on their "short sojourns abroad," making the differential citizenship requirement constitutionally permissible even though it is sex discriminatory.[5] What's still more incredible about

3. U.S. Const. amend. XIV, § 1. Although the text of the Equal Protection Clause refers only to state governments, the Supreme Court incorporated its requirements against the federal government in *Bolling v. Sharpe*, 347 U.S. 497 (1954), the companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954).

4. Reed v. Reed, 404 U.S. 71 (1971).

5. Nguyen v. Immigration and Naturalization Service, 533 U.S. 53, 64–67 (2001). But cf. Sessions v. Morales-Santana, 582 U.S. 47, 65–66 (2017) (distinguishing *Nguyen* to

Geduldig's argument, by comparison, is that it doesn't even get to that second step of justification. On *Geduldig*'s analysis, pregnancy discrimination is *not even* sex discriminatory, let alone constitutionally impermissible—according to the Court, even if California's disability insurance program treats pregnant persons differently from nonpregnant persons, it does not therefore treat women differently from men so long as there are women who don't become pregnant and no men who do.

Half a century later, not only is *Geduldig* still received as good law by U.S. courts, but its "pregnancy discrimination is not sex discrimination" argument is enjoying a newfound relevance of sorts, as it is being applied to curtail both reproductive and transgender rights in an ongoing wave of cases—a "*Geduldig* 2.0" (Eyer 2023), if you will. In his recent majority opinion revoking abortion as a federal constitutional right, for example, Justice Samuel Alito cited *Geduldig* as proof that abortion bans—which, just like the denial of pregnancy disability coverage, target "a medical procedure that *only one sex* can undergo"—are in no direct tension whatsoever with constitutional requirements of gender equality.[6] Following the Supreme Court's lead, the U.S. Court of Appeals for the Sixth Circuit expressly invoked *Geduldig* in allowing a statewide ban on lifesaving medical care for trans youth to go into effect for the first time in American history.[7] "If a law restricting a medical procedure that applies only to women does not trigger heightened scrutiny [for sex discrimination], as in *Dobbs* and *Geduldig*," the Sixth Circuit reasoned, "these laws, which restrict medical procedures *unique to each sex*, do not require such scrutiny either."[8] Similar arguments have found increasingly widespread success before the lower federal courts and may soon be taken up by the Supreme Court.[9]

The interdependence of reproductive and transgender rights makes it all the more regrettable that the prevailing feminist response to the *Geduldig* line of cases is to double down on the awkwardly cissexist no-

strike down a separate sex-based differential requirement on the automatic transmission of U.S. citizenship).

6. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 236 (2022) (dictum) (my emphasis), *overruling* Roe v. Wade, 410 U.S. 113 (1973), *and* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

7. L.W. v. Skrmetti, 73 F.4th 408, 419 (6th Cir. 2023).

8. L.W. v. Skrmetti, 83 F.4th 460, 481 (6th Cir. 2023) (my emphasis), *cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024). See also, e.g., Eknes-Tucker v. Governor of the State of Alabama, 80 F.4th 1205, 1229–30 (11th Cir. 2023) (holding that a state law prohibiting gender-affirming care for transgender youth does not discriminate on the basis of sex, transgender status, or gender nonconformity), *petition for cert. filed sub nom.* Eknes-Tucker v. Marshall, No. 24-612 (U.S. Nov. 26, 2024).

9. See especially United States v. Skrmetti, No. 23-477 (U.S. argued Dec. 4, 2024). For a critical discussion of some of these *Geduldig*-inspired arguments as applied to trans discrimination, see Ding (2023).

tion that pregnancy marks what is perhaps *the* real sex difference.[10] In her pathbreaking treatment of the philosophical foundations of gender equality law, Catharine MacKinnon writes of the Court's pregnancy cases: "To deprive a woman . . . of disability pay because she is pregnant discriminates on the basis of sex because pregnancy has a *direct* relation to sex, and produces immediate disadvantages for employment for women only—and that is the end of the argument" (1979, 123, her emphasis). MacKinnon's strategy for resisting *Geduldig*'s result, in other words, is to concede its conception of pregnancy as distinctively women's, which continues to be taken for granted by even the explicitly trans-inclusive feminist analyses on offer. Whereas Justice Stewart argues that pregnancy discrimination is *not* sex discrimination because pregnancy is distinctive to women as a gender category, MacKinnon counters that pregnancy discrimination is sex discrimination precisely *because* pregnancy is distinctive to women as a gender category.[11] What this has meant in the concrete terms known as lived trans lives is that received feminist analyses of pregnancy discrimination in fact "make it more difficult for transgender people to stake our own claims to bodily autonomy and reproductive health," as the American Civil Liberties Union's Chase Strangio points out. "What becomes of the transgender woman who cannot become pregnant or the transgender man who is pregnant?" they lament. "They are quite literally written out of existence" (2016, 235).

But here comes the tricky part: in order to write trans people into a feminist analysis of pregnancy discrimination, it's not enough to acknowledge simply that not only women become pregnant. After all, if pregnancy discrimination wrongs pregnant women just as it wrongs pregnant persons of all other genders, isn't the discrimination now truly based on pregnancy as such? To fully and genuinely confront *Geduldig*, feminists need to do a lot more than mechanically expand existing cis-centric analyses of pregnancy discrimination so as to be merely "inclusive" of trans people; we must critically reconsider how we are conceptualizing pregnancy discrimination in the first place.

10. I use the term 'cissexist' to characterize any attitude, practice, or structure that in one way or another discounts trans people's genders, intentionally or not.

11. More recently, Reva Siegel, Serena Mayeri, and Melissa Murray (2023) make a point to reject the assumption that "a man or a nonbinary person cannot be pregnant" as one of those "sex-role stereotypes that denigrate or impose constraints on individual opportunity" (78); nevertheless, their argument against the constitutionality of abortion bans ultimately turns on the claim that such laws "single out *women* in order to impose traditional sex roles on them" (80, my emphasis). Even David Fontana and Naomi Schoenbaum's (2019) ambitious project to *unsex* pregnancy in law, which expressly affirms the "real phenomenon of the pregnant man" (338), still goes on to assert: "Only the pregnant *woman* carries the fetus. Only *she* constantly feels the fetus and experiences the emotional connection this generates" (344, my emphasis).

This essay takes up that task. The failure of the prevailing feminist response to *Geduldig*, legitimizing rather than challenging biological essentialism in legal analysis and public discourse, epitomizes a broader failure of feminist analysis and intersectional solidarity; it does not face up to the political and social problem that is pregnancy discrimination for either cis or trans people. In the following pages, I lay the groundwork for a trans feminist alternative. Arguing from first principles, I suggest that pregnancy discrimination counts as discrimination on the basis of sex within the meaning of the Equal Protection Clause not because pregnancy is in one way or another distinctive to women as a gender category but because pregnant persons make up a gender category of their own. The crucial move here is to contest the assumption that the meaning of the term 'sex' that's relevant to legal analysis is its biological meaning, not its social meaning—that is, *gender*.[12] Drawing on MacKinnon's own work, I argue that to be discriminated against on the basis of sex is not to be treated differently based on sex mystified as a *biological* difference, as *Geduldig* has it, but to be systematically disadvantaged because of the *social* meaning of sex, which has as one of its dimensions the social meaning of pregnancy. In my view, to say that pregnancy discrimination is based on sex in legal analysis is simply to say that it's at least in part because of gender in social reality. So analyzed, pregnancy discrimination—the discrimination against pregnant persons because of the social meaning of pregnancy, that is, *because of gender*—comes out as a form of sex discrimination directly and immediately, not by way of womanhood.

My analysis turns MacKinnon's treatment of pregnancy discrimination on its head. Indeed, I argue that, on a sophisticated reading, it is MacKinnon's own radical feminist account of sex discrimination more broadly that best motivates this trans feminist analysis of pregnancy discrimination avant la lettre. My plan, then, is to begin with MacKinnon's account (§ 1), show that her explicit attempt to apply that account to pregnancy discrimination fails to follow through on its own trans feminist insights (§ 2), and proceed to do it the right way by extending and amending Sally Haslanger's (2012) innovative account of gender categories (§ 3). MacKinnon's radical feminism, it turns out, may be radically *trans* feminist after all.[13]

12. I use single quotation marks for words referred to as words (e.g., *'sex' has three letters*) and double quotation marks for standard applications (e.g., *American gender equality law still presumes an unproblematic "biological sex"*).

13. To be very clear, the analysis of pregnancy discrimination I defend here does not stand or fall on my reading of MacKinnon. I offer the interpretative point in part because I see it as the best way to motivate the analysis, and in part in response to trans-exclusionary conceptions of radical feminism that seem to be taken for granted in public and even academic discourse—conceptions that, as feminist theorists (including MacKinnon herself) have demonstrated time after time, are tenuous at their best. See,

1. Discrimination as Unequal Social Meaning

MacKinnon locates *Geduldig*'s mistake in its conception of what discrimination is, which she vividly dubs the "differences" (1979, 101) or "difference" conception "because it is obsessed with the sex difference" (1987, 34).

The differences conception analyzes discrimination as differential treatment from similarly situated counterparts due to some underlying characteristic itself. On this view, the racial segregation of schools discriminates against Black students on the basis of race to the extent that it treats Black students differently from similarly situated white students due to skin color itself, which the differences conception construes as a racial difference. Applied to sex discrimination, the differences conception then holds that to discriminate against women on the basis of sex is likewise to treat women differently from similarly situated men due to sex itself, considered in its biological meaning, as a biological difference. But on the assumption that pregnancy simply *were* a sex difference, there could not even be any similarly situated men whom pregnant women might be comparable to, never mind treated differently from. The result is *Geduldig*: the differential treatment inherent in pregnancy discrimination is based on pregnancy, not sex; pregnancy discrimination is not sex discrimination.[14]

By contrast, MacKinnon argues that the relevant analytical question here isn't "different from whom" but "to whose detriment." Instead of construing discrimination formalistically as differential treatment and sex and race biologically as intrinsic differences, MacKinnon's alternative—the "inequality" (1979, 102) or "dominance" (1987, 40) conception—turns to the substantive disadvantages enabled by the social meaning of those presumed biological differences.[15] Consider school segregation again. On an inequality analysis, segregated schools are racially discriminatory not because they treat Black students merely differently from similarly situated white students due to race reduced to skin color reduced to a biological difference, as the differences conception has it. Rather, the racial discrimination consists in the ways in which Black students are sys-

e.g., Elliott (1973), Serano (2007, chap. 12), Williams (2016), and MacKinnon et al. (2024).

14. One could, of course, attempt to rescue the differences conception from the *Geduldig* implication. I agree with MacKinnon that such attempts would not be ultimately successful, though I do not have the space to litigate that fully here. My main strategy is instead to undermine the motivation for the differences conception on grounds of explanatory power. At the very least, so long as the trans feminist alternative I go on to develop cleanly bypasses *Geduldig* in a way that the differences conception does not, this is already a strong case for a trans feminist treatment of pregnancy discrimination in particular and sex discrimination more generally.

15. Here, I follow MacKinnon in understanding social meaning in terms of its materiality, not merely its symbolism.

tematically (i.e., nonaccidentally) disadvantaged because of what it *means* in this society to be Black, a meaning encapsulated in and enforced by school segregation.[16]

The inequality conception realizes that what's at stake in discrimination is not who is treated differently from whom due to what relevant or irrelevant, real or imagined, underlying characteristic passing as a "biological difference," but the *social meaning* of this received difference which produces under the guise of biological inevitability substantive disadvantages all over the place. A helpful way to draw out this contrast in the case of sex discrimination is to ask which meaning of 'sex' and which meaning of 'discrimination' is relevant to the law. To the differences conception, the legally relevant meaning of 'sex' is its biological meaning—that is, sex differences—and the legally relevant meaning of 'discrimination' its formalistic meaning—that is, differential treatment. From an inequality standpoint, the legally relevant meaning of 'sex' is its social meaning—that is, *gender*—and the legally relevant meaning of 'discrimination' its substantive meaning—that is, systematic disadvantages.

Take, for example, school dress codes. Up until very recently, a North Carolina school still saw fit to require girls to wear skirts, because apparently to be a lady is to be—as the school's founder put it in an actual deposition—"a fragile vessel that men are supposed to take care of and honor."[17] Unlike the case with pregnancy, it's now a lot easier to grasp what used to be the radical notion that pants and shorts fit girls just as well as boys, making girls similarly situated as boys in this context. But note that while the skirt requirement certainly treats girls differently from boys (girls must wear skirts), it also treats boys just as differently from girls (boys need not—indeed, must not—do the same). If discrimination were what the differences conception says it is, then the skirt requirement would be as discriminatory toward boys as it is toward girls. That's not how it works in reality, of course, and nobody knows this more clearly and distinctly than the girls themselves. "The dress code and the constant monitoring by teachers and school administrators made me feel like they thought girls should not play roughly, or be as active and able to move around as freely

16. To say a disadvantage is *systematic* or *nonaccidental*, as I follow Haslanger's usage here, is to say that it's to be explained at least in part by social category membership (2012, esp. 327–30; see also 1979, 131–33, 147, 199). Note too that the inequality conception does not require the relevant social meaning to have been created by school segregation. Nor does it require an inquiry into the discriminator's mind. The inequality conception thus challenges the now-standard distinction between "direct" and "indirect" discrimination (known in U.S. law as "disparate treatment" and "disparate impact" theories of discrimination). I join Iris Marion Young (1990, 148–51) and Sophia Moreau (2020, 185–88) in regarding this as a plus for an account of discrimination.

17. Quoted in Peltier v. Charter Day School (*Peltier II*), 37 F.4th 104, 113 (4th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2657 (2023).

and comfortably as boys—that we simply weren't worth as much as boys," a sixteen-year-old student, K.B., broke it down for the district court.[18] "Girls having to wear skirts and dresses sends the message that girls should be less active than boys and that they are more delicate than boys," concurred another student, I.B., then eleven years old. "This translates into boys being put in a position of power over girls."[19] The school treats girls differently from boys in order to treat them disadvantageously relative to the boys, not the other way around. And it forces girls—and girls specifically—to wear skirts because it views them as *girls*, in the most thinly veiled social meaning of that term. The sex discrimination consists in the unequal social meaning of sex embodied in the differential treatment, not the equally differential treatment as such.[20]

To me, it's precisely this turn from presumed sex differences themselves to their unequal social meaning that invites a plausible reading of MacKinnon's view as trans feminist. Declining to accept sex differences as unproblematic biological givens to begin with, the inequality conception seeks to make space for a feminism that can finally get past troubled debates about what purportedly biological difference is or is not there and whether it may or may not justify what social differential. So clarified, sex discrimination has nothing to do with any alleged sex differences themselves, yet everything to do with the oppressive social structures and forces that nurture differences, turn them into substantive disadvantages, and then purport to be justified by the meaning of those differences in the first place.[21]

Curiously, even as she was writing in 1979, MacKinnon had for the most part the conceptual resources needed to develop these insights into a full-fledged trans feminism. Rejecting the cissexism implicit in the differences conception, she argues,

> Socially as well as biologically, gender is not as rigidly dimorphic as it is commonly supposed to be in legal discussions of equality. It is, instead, *a range of overlapping distributions with different median points*. . . . If for most characteristics the majority of women and men fall in the area where the sexes

18. Declaration of K.B. ¶ 19, Peltier v. Charter Day School (*Peltier I*), 384 F. Supp. 3d 579 (E.D.N.C. 2019) (No. 16-cv-30), https://www.aclu.org/sites/default/files/field_document/2017.11.29_ecf_152-8_kb_declaration.pdf.

19. Declaration of I.B. ¶ 16, *Peltier I*, 384 F. Supp. 3d 579 (No. 16-cv-30), https://www.aclu.org/sites/default/files/field_document/2017.11.29_ecf_152-7_ib_declaration.pdf.

20. The plaintiffs in this case challenged the dress code only as applied to cisgender girls. *Peltier II*, 37 F.4th at 112 n.2.

21. A theory of sex discrimination that obscures this operation of sexist power only further perpetuates sex discrimination through what Nora Berenstain (forthcoming) calls "structural gaslighting."

> overlap, to premise legal approaches to the sexes on their differences requires the exclusion of those persons whose characteristics overlap with the other sex—that is, most people. The extremes, the tails of both curves, which apply only to exceptional women and men, . . . become norms, ideals for emulation, and standards for judgment when they are not even statistically representative. (1979, 155, my emphasis)

According to MacKinnon, these overlapping dimensions of gender include "physical characteristics, gender identification, and sex role behavior," and we are explicitly warned that even "on the biological level, the sex difference is not a polar opposition, but a continuum of characteristics with different averages by sex grouping" (151–52). In a fascinating passage, she adds, "A transsexual operation [*sic*], with hormone therapy, can largely transform gender on the physical level, with the major exception of reproductive capacity. But then many born males and females do not possess reproductive capacity for a variety of biological and social reasons" (151; cf. MacKinnon 1983, 636n3).

MacKinnon's view on the metaphysics of sex and gender was as provocative back in 1979 as it still is today. But then it's all the more puzzling that her explicit attempt to apply the inequality conception to pregnancy discrimination fails to make good on its own trans feminist insights. With this hindsight in mind, I now turn to the failure of MacKinnon's application in order to tease out what I believe an inequality analysis of pregnancy discrimination should have been like in principle (§ 2). I then show how such an analysis can be done in reality (§ 3).

2. Pregnancy as a Gender Status and Position

Following the differences conception, the *Geduldig* Court held that pregnancy discrimination is not sex discrimination because it involves no differential treatment on the basis of sex construed as a biological difference. In response, MacKinnon argues that in analyzing sex discrimination, we should privilege the social rather than biological meaning of 'sex' and the substantive rather than formalistic meaning of 'discrimination.' So understood, sex discrimination consists not in differential treatment due to a presumed sex difference itself but in the systematic disadvantages enabled by its social meaning—that is, gender.

By the same token, one would expect that pregnancy, in the sense suitable for an inequality analysis, should too be a *gender* status and position at the social rather than biological level. Infuriatingly, MacKinnon's explicit treatment of pregnancy discrimination is all too comfortable falling right back into biology, construing pregnancy as "a condition unique and common to women as a gender" (1979, 118), as one of "those few

characteristics that approach being truly generic to a sex group" (155). Women as a gender category are systematically disadvantaged because of the social meaning of pregnancy, on MacKinnon's view, *because* women and only women become pregnant.

The problem with a retreat to biology like this is not just that one need not be a woman to become pregnant; it's that even when it is a woman who is discriminated against on the basis of her pregnancy, the systematic disadvantages she faces consist not in the mere biological fact that she happens to be pregnant but in the unequal social meaning of that biology—which MacKinnon would theorize as womanhood. In employment, for example, an inequality analysis finds pregnancy discrimination not in the fact that one is pregnant, or even in the fact that one once was or may become pregnant, but "in the meaning given that biology by *the model of the job*" (121, my emphasis), which privileges the ability to work uninterrupted by health needs and caregiving work (which, socially, is hardly work at all); "by *the disability plan*, which covers women's health needs only up to the cost of covering men's" (121, my emphasis); and by "*the structure of the job market*, which accommodates the physical needs, life cycle, and family expectations of men but not of women" (118, my emphasis).[22]

The suggestion that in theorizing sex discrimination, pregnancy is far better analyzed in terms of its unequal social meaning is echoed by Amy Reed-Sandoval's (2020) account of the social meaning of pregnant bodies at the Mexico-U.S. border. Reed-Sandoval tells the story of a migrant mother Salma,[23] who had legal authorization to cross the border, but as she approached the immigration checkpoint, still risked her life by forcing herself to sit upright in the car—something that her doctor had explicitly forbidden her to do. "She just cannot risk arousing suspicion at the border by looking like a sick, pregnant woman on verge of giving birth in the United States" (100). That Salma is *legally* documented is key: pregnant migrants who are legally authorized to enter the U.S. are still subject to systematic disadvantages because their visible pregnancy is interpreted *socially* as proof that they are undocumented and thus "illegal" after all. They are, in Reed-Sandoval's words, "socially undocumented." The discrimination faced by pregnant migrants like Salma needs to be explained in terms of the social meaning of pregnancy as a presumption of illegality, not the underlying reproductive biology as such.

It is again curious, though perhaps ultimately unsurprising, that the flaws of an analysis that looks to biology for a social disadvantage do not escape MacKinnon, at least not when it's the differences conception that

22. For helpful discussions, see MacKinnon (1979, 271n72), Young (1990, 176), and Schouten (2018, 188, 190–93).

23. "Salma" is a name used to protect the migrant mother's identity.

does it. "Confronted with what looks to be a real difference between the sexes," she writes, the differences conception "implicitly attributes it to biology. In this way, substantive judgments are made about which differences between the sexes are 'real' or 'relevant' (in terms of permissible differential consequences) without explicitly investigating which real differences and consequences may result *from sexism itself*" (1979, 120, my emphasis). And yet, to find the social disadvantages of pregnancy in "women's" reproductive biology is precisely to acquiesce in the pernicious myth that biology—not "sexism itself"—is what explains sex discrimination (MacKinnon 1982, 526, 528n24; see also Wittig 1992, 10–11). In school segregation cases, the question of whether Black children are systematically disadvantaged because of the social meaning of black skin color is settled not by asking whose skin color is in fact black but by confronting the social reality that is the racialized hierarchy of privileges and disadvantages embodied in and enforced by school segregation (MacKinnon 1979, 139–40). Likewise, what systematically selects trans women for transmisogynistic violence is not our beautifully varied bodies but being read socially as "the man pretending to be a woman" or exposed naked as "the woman who's really a man" (Bettcher 2007, 2014; Serano 2007, chap. 2). Even in cases where it's a pregnant woman who is discriminated against on the basis of pregnancy, then, it is all the more important to be clear on the level of analysis that the sex discrimination consists not in her pregnancy as such but in its unequal social meaning.

3. Pregnant Persons Redux

I have argued that MacKinnon's analysis of pregnancy discrimination is not just unsuccessful; more puzzlingly, it's inconsistent with the commitments of her own theory of sex discrimination. But I wish to suggest that MacKinnon's mistake is not intrinsic to the inequality conception itself. On the contrary, I view the inequality conception as foundational to a genuine trans feminist alternative. To formulate that alternative, we need an account of how pregnancy discrimination still counts as discrimination on the basis of sex within the legally relevant meaning of 'sex'—that is, within its social rather than biological meaning—when it systematically disadvantages members of every gender. I now proceed to offer that account.

The way I see it, what *Geduldig* gets wrong is not just its conception of discrimination as differential treatment, joined by a cissexist conception of pregnancy as distinctively women's. Rather, there is another implicit assumption:

> *The binary conception of sex.* To discriminate on the basis of *sex* just is to discriminate on the basis of either *being a man* or *being a woman.*

I call this the *binary* conception of sex to stress its conflation of sex with *either* manhood *or* womanhood, not to imply that it's not also cissexist and essentialist. Working under a cissexist conception of pregnancy, the Court first takes for granted that it is impossible to treat pregnant women differently from pregnant men (and vice versa) when no such pregnant men exist. Now add the differences conception of discrimination, and it follows that the pregnancy exclusion at issue in *Geduldig* can discriminate against neither women nor men. To go from no discrimination against either *women* or *men* to no discrimination on the basis of *sex*, however, is not trivial; it's the binary conception of sex at work.

This binary conception of sex survives intact in MacKinnon's analysis. Whereas the Court is hung up on the idea that pregnancy discrimination can't be on the basis of sex if it involves no *differential* treatment based on an underlying sex difference, MacKinnon treats that as a decisive reason to jettison the differences conception in favor of her inequality alternative. Crucially, however, MacKinnon's own attempt to apply her view to pregnancy discrimination does not contest the Court's assumption that for pregnancy to be gendered, it has to go through womanhood in some way. According to the Court, that's why pregnancy discrimination is not a form of sex discrimination; according to MacKinnon, it's why pregnancy's social meaning needs to be analyzed as systematically disadvantageous to pregnant persons *qua women*.[24] In so doing, both MacKinnon and the Court take it as a given that womanhood is the interpreter necessary for translating a complaint against pregnancy discrimination into a complaint against sex discrimination. It is this appeal to womanhood as the bridge between sex and pregnancy discrimination that is at the heart of MacKinnon's mistake.

The thing is, there *is* no gap between sex and pregnancy discrimination waiting to be bridged. I argue that pregnancy discrimination is discrimination on the basis of sex because it bears on the social meaning of sex *directly* and *immediately*, not by way of womanhood. In other words, the category of persons systematically disadvantaged because of the social meaning of pregnancy is *already* a gender category even without having to be lumped into the category of women.

The guiding idea is that the analytical categories most explanatorily useful to our best social, political, and legal theory need not be limited to, or even map onto, those that we know from the dominant social world. In fact, an empirically sophisticated inquiry may well reveal that none of the dominant social categories that first come to mind in the philosopher's armchair would turn out to be the most explanatorily useful. Consider, in this light, Talia Mae Bettcher's suggestion that the category of persons

24. Rhys Borchert helped me put the point this way.

that prostate cancer screening should target is not *men* but *people with prostates*:

> The difficulty is that the trans women might not count themselves as men at all in any context, or they might not consider their prostates to undermine their claims to (trans) womanhood. . . . Often, what happens is that the social meaning commonly associated with a body part is, in a subcultural context, completely changed. In light of this, a trans woman might reasonably complain that testing for prostate cancer cannot be viewed in terms of testing only men (or males). Such a claim, she might argue, is transphobic in that it erases the existence of trans women by treating them as nothing but (non-trans) men. Instead, once trans women are taken seriously, the testing ought to be framed in terms of testing both non-trans men and trans women of a certain age. More simply, the testing could be done on *people with prostates*. (2013, 240, my emphasis)

One way to interpret Bettcher's point is that even though *people with prostates* is not a category readily recognized by the dominant cisheterosexist world, it best explains why prostate cancer screening should cover anybody with a prostate. And to the extent that this category captures some dimension of the social meaning of sex—here, the appropriate target of prostate cancer screening efforts—it is a gendered one for structurally the same reason as, say, the category *women* is.[25] Crucially, on my view, to recognize that people with prostates make up a gendered analytical category—or simply, a gender category—is only to acknowledge its explanatory power, not to claim that being a person with a prostate may therefore serve as an anchor for the construction of our authentic identities. For this reason, I find it helpful to distinguish *gender categories* (which, to me, are theoretical constructs serving explanatory roles in critical feminist theory) from what I call *genders* proper (which are the sort of building bricks that may make up part of who we authentically are).[26] While many gender categories (e.g., *people with prostates*) are not identity-anchoring and thus do not further constitute genders, all genders (e.g., *women*) are explanatorily useful and thus further constitute gender categories. Having the distinction helps to avoid by-now-familiar worries

25. See Tomalty et al. (2022) for an important discussion of whether the homologous "Skene's gland" in cis women should be recognized as a prostate proper, given their striking similarity in both anatomy and function.

26. If the terminology is not entirely intuitive to you, try also thinking of it in terms of a difference between *genders* and *Genders*. Cf. Haslanger (2012, 244–45).

about wrongful exclusion, marginalization, and inclusion, which I circle back to below.

In our case, I argue that pregnancy discrimination is discrimination on the basis of sex within the legally relevant meaning of that phrase because—not despite—of the fact that it is discrimination against pregnant persons *qua pregnant persons*, where pregnant persons constitute a gender category that captures the social meaning of pregnancy as a dimension of the social meaning of sex. To suggest this is to ask us to go beyond the binary, but not in the obvious way. What I'm interested in is the explanatory power made possible by the realization that *pregnant persons* is fruitfully analyzed as a nonbinary gender category for purposes of conceptualizing pregnancy discrimination as a form of sex discrimination; this is orthogonal to whether being a pregnant person may anchor the construction of one's authentic self. And my aim is to say enough to make appealing—as a strategy for overcoming *Geduldig*—the idea of theorizing pregnancy discrimination vis-à-vis the nonbinary gender category *pregnant persons*; I do not attempt to give a fully fleshed-out account of the social meaning of pregnancy, let alone the social meaning of sex.

My starting point is Haslanger's now-classic proposal that the category of persons systematically disadvantaged because of the social meaning of their bodies being interpreted as female can and should be analyzed as the following gender category:

> *Women*. The analytical category *women* consists of those who are "systematically subordinated along some dimension (economic, political, legal, social, etc.)" due to "observed or imagined bodily features presumed to be evidence of a female's biological role in reproduction [*sic*]" (2012, 230; see also 234–35).

Now, there is a broad consensus among feminist metaphysicians that Haslanger's account—pitched as an account of *women*—does not work because it wrongfully excludes or at least marginalizes trans women and wrongfully includes trans men and nonbinary people (McKitrick 2015; Jenkins 2016; Kapusta 2016). I agree with this assessment, and contrary to recent suggestions (Mikkola 2016; Barnes 2020), I suspect that the problem runs metaphysically deep. But I take it to be a crucial insight from Haslanger that gender categories may serve as a powerful analytical tool for capturing and theorizing gender as the social meaning of sex, regardless of the ultimate merits of Haslanger's own attempt at spelling out that meaning.

For our purposes, I offer the following modified version of Haslanger's account designed to sidestep important counterexamples:

> *Gender categories*. An analytical category is gendered (for critical feminist analytical purposes) if but not only if its members are socially positioned as subordinate or privileged along some dimension (economic, political, legal, social, etc.) due to (actually or potentially) observed or imagined bodily features presumed (taken, suspected, expected, etc.) to be evidence of a (present, previous, or future) body socially interpreted as sexed one way or another.

My version departs from Haslanger's in three major ways. First, my version identifies only a sufficient condition so as to leave room for categories based on one's authentic sense of self to count as gender categories as well. Second, my version goes beyond "biological role in reproduction" to encompass the broadest range of ways in which bodies may be interpreted socially as sexed—including, here, as pregnant (cf. Haslanger 2012, 230n12, 233). Third, my version does not require the actual observation or imagination of bodily features in light of cases where someone is or expects to become pregnant and is disadvantaged because of pregnancy's social meaning on that basis, but for one reason or another is never observed or imagined by others to have bodily features that may be evidence of a present, previous, or future pregnant body (think a stealth trans masculine person who is known as a cis guy to colleagues and friends but for work reasons needs to move to a U.S. state where abortion is now unlawful). In these cases, the relevant bodily features *would* still be observed or imagined under the right kind of idealizing conditions (cf. Haslanger 2012, 237n17).[27]

On my account, the category of persons systematically disadvantaged because of the social meaning of their bodies being interpreted as pregnant comes out straightforwardly as a gender category (cf. Murray and Eastwood 1965, 238–41). Call this category of persons *pregnant persons*:

> *Pregnant persons*. The analytical category *pregnant persons* consists of those who are systematically subordinated along some dimension (economic, political, legal, social, etc.) due to (actually or potentially) observed or imagined bodily features presumed (taken, suspected, expected, etc.) to be evidence of a (presently, previously, or future) body socially interpreted as pregnant.

Crucially, the category of pregnant persons overlaps with, but is not reducible to, the category of women (understood as the category of persons

27. Thanks to Katie Zhou for suggesting this counterexample and then helping me think through how best to deal with it.

for whom being a woman is constitutive of who they authentically are rather than as Haslanger analyzes it). Consider an analogy: Many of us are novelists, and many of us poets. Even though the categories *novelists* and *poets* overlap, they are nevertheless distinct, and neither is more fundamental than the other. Similarly, *pregnant persons* and *women* are two distinct categories that pick out importantly different dimensions of gender, and neither is more fundamental than the other. Being a pregnant person does not *ipso facto* make one a woman any more than being a novelist *ipso facto* makes one a poet, and vice versa. And that finally respects the reality that many but not all pregnant persons are women, just as many but not all novelists are poets.

The category *pregnant persons*, so analyzed, includes many who are not—and perhaps may not become—pregnant. This is how it should be. If the social meaning of pregnancy systematically disadvantages anyone whose body is or would be taken, suspected, or expected to be, to have been, or to become pregnant, it's not just actually pregnant persons who are systematically subject to pregnancy discrimination. Insofar as trans feminine people—just like cis women who for one reason or another do not become pregnant—are nonaccidentally disadvantaged because of the social meaning of being imagined to have or lack certain reproductive capacities, my account appropriately acknowledges their personal stake in challenging pregnancy discrimination (see Reed-Sandoval 2020, 73, 105; Woollard 2022).

Don't get me wrong: I am *not* claiming that pregnancy discrimination is equally disadvantageous to every pregnant person. The useful case to think about here is cis women who, by circumstance or choice, do not become pregnant. The dominant social definition of womanhood in terms of birth-giving is something that all women, cis and trans, are forced to reckon with. If we should say that all cis women are systematically disadvantaged because of the social meaning of pregnancy, then the same goes for all trans women. But just as pregnancy discrimination disproportionately disadvantages pregnant persons of color, pregnant migrants and refugees, incarcerated pregnant persons, and economically disadvantaged pregnant persons, my account has the conceptual space to acknowledge that pregnancy discrimination also disproportionately disadvantages those who may and do become pregnant.

Still, one might worry: but isn't being pregnant clearly nobody's gender? The neat thing is that my view does not say it is. Again, not all *gender categories*, on my view, also constitute *genders* that may make up part of who we authentically are (though all genders are also gender categories). And for better or worse, we do not anchor our authentic sense of self to being a pregnant person the way many of us do with respect to be-

ing a woman.[28] All I'm saying here is that we can—and, to finally get past *Geduldig*, should—recognize the category of pregnant persons as a systematically subordinate gender category for purposes of analyzing pregnancy discrimination as a form of sex discrimination; I'm not suggesting that *pregnant persons* can be identity-anchoring. My account of *pregnant persons* is therefore not vulnerable to analogous worries of wrongful exclusion, marginalization, and inclusion which trouble Haslanger's account of *women*.

If the category of pregnant persons is itself gendered, then to disentangle pregnancy from womanhood is *not* to ungender or even unsex pregnancy. Both MacKinnon (1987) and the late Justice Ruth Bader Ginsburg (1985) have rightfully criticized the *Roe* Court for treating the right to abortion as, doctrinally, a gender-*neutral* right to privacy or patient autonomy—or worse, a physician's right to practice medicine—rather than a right to *gender* equality. More recently, Elizabeth Barnes makes a compelling case that the oppression of cognitively disabled women needs to be analyzed as oppression directed at women, not just "the female body": "Consider, for example, the recent case of a cognitively disabled woman who was ordered to terminate a pregnancy by a UK court. This was not merely a state-ordered invasive procedure on a female body. . . . The view taken by the court was that she was not capable, despite her wishes, of being a *mother*. . . . And judgements about what makes a good or fit mother aren't fully explained by social views about the female body" (2022, 851, her emphasis). Barnes is careful to note that it is one thing to assign gender and quite another to assign womanhood specifically. Still, on her view, there is a *pro tanto* reason to assign womanhood to a person who does not experience a gendered sense of self but "is female and is oppressed as a woman" (852).

I worry that operative in both the Barnes and MacKinnon-Ginsburg lines of critique is still the assumption that oppression from pregnancy and motherhood is the distinctive experience of women or "females." I understand that it's an assumption that "makes sense" (Barnes 2022, 852, 857). For a critical feminist analysis, however, the more pressing question is *to whom* it makes sense. Barnes is clearly right that there is no autonomy-based misgendering worry about assigning womanhood to people who don't have a deep sense of themselves as gendered, but what's also at stake is who gets to say what bodies mean and for whom they take on meaning—a broader issue of unequal power.[29]

28. Rowan Bell (2024) develops an account of authenticity particularly useful for explaining why this may be the case. It should also be clear by now that I'm interested in the explanatory power of the analytical category *pregnant persons*, not the meaning of the English term 'pregnant persons.'

29. Of course, this is not to imply that misgendering does not raise an issue of unequal power.

Pregnancy discrimination is almost always experienced as discrimination against pregnant women because, to the dominant cisheterosexist world, having a pregnant body simply *means* having a woman's—a mother's—body. But that dominant interpretation of pregnant bodies is far from a given. Haslanger, for her part, cautions that "in imagining 'alternative' genders we should be careful not to take for granted that the relevant biological divisions will correspond to what *we* consider 'sex.' " Then, in a parenthetical, she imagines, "Alternative groupings could include: 'pregnant persons,' 'lactating persons,' 'menstruating persons,' 'infertile persons,' (perhaps 'homosexuals,' depending on the story given about physical causes)" (2012, 244, her emphasis).[30]

Trans people's experiences confirm that Haslanger's caution is warranted. Tala Brandeis explains, "If you make the leap and identify me as female, then, in fact, my genitalia are a woman's genitalia, however twisted and uncommonly formed, no matter my ovaries external, my lips closed/fused shut, my vagina/uterus imprisoned and atrophied, my urethra inside my unseemly clit. My genitalia may be classified as female genitalia if I am female, no matter how unusual they may appear, how peculiar they are" (1996, 55). "That testicles, penises, XY karyotype, and prostates count as *male* in the first place," thus observes Bettcher, "is precisely what trans subcultures are *contesting*" (2013, 240, her emphasis). In trans lives, such an alternative "cultural world," where trans people get to set the terms of our own bodies, becomes a powerful source of joy, love, comfort, strength, creativity, and freedom that we live out—in Bettcher's words—"with dignity" (242).

To say all of this, to be sure, is not to deny that there are cases of intersectional discrimination targeting pregnant women qua pregnant *women*. On my account, being a pregnant person and being a woman are not mutually exclusive. A pregnant woman may be discriminated against not just because she is a pregnant person and separately a woman but because she is a pregnant woman, in much the same way a trans woman may be discriminated against not just because she is a trans person and separately a woman, but because she is a trans woman. The latter case involves not just any misogyny but transmisogyny; the former not just any pregnancy discrimination but misogynistic pregnancy discrimination.[31]

30. I hesitate, though, about the suggestion that whether homosexual persons make up a gender category is to be settled by whether we are born this way. A better way to approach the issue, I think, is to consider whether being a homosexual person expresses or otherwise nonaccidentally participates in some dimension(s) of the social meaning of sex. Clearly it does, although on my approach it's a separate question as to whether a gender category further constitutes a gender (some, like *butches* and *femmes*, clearly do).

31. For related discussions of intersectional discrimination, see Crenshaw (1989), Serano (2007), and Bernstein (2020).

Nobody, however, is a woman by virtue of discrimination: being treated socially as a woman may make one a woman in the eyes of the dominant cisheterosexist world; it does not make one a woman (*pace* Haslanger 2012; Jenkins 2016). Proceeding intersectionally in this way, moreover, helps us to envision gender-*affirming* reproductive care for pregnant persons who are not women.[32]

So, both pregnancy and womanhood can be analyzed as gendered social meanings without becoming one and the same, and pregnancy discrimination can intersect with other forms of sex discrimination without one being reducible to another. What we end up with is a version of the inequality conception of discrimination that embraces the following two theses in place of the binary conception of sex and the cissexist conception of pregnancy:

> *Ontological pluralism about gender categories*. There are more gender categories (including nonbinary genders as well as strictly analytical gender categories such as *pregnant persons*) than *women* and *men*.
>
> *Ontological egalitarianism about gender categories*. The categories *women* and *men* are no more fundamental than any other gender categories.[33]

Now, would my view count a lot of categories as gender categories (examples that have been suggested to me include *people with mustaches*, *people with food babies*, and *boy toys*)? I'm perfectly happy to answer "yes," and I don't think that should keep anybody up at night. Not all gender categories, after all, are equally socially meaningful, and even the same gender category may not be equally socially meaningful across all contexts. To say that *people with mustaches* constitutes a gender category is not, by itself, to imply that it plays a significant role, or ought to play such a role, in our everyday lives.[34]

Taking pluralist egalitarianism on board, the trans feminist analysis developed here finally allows us to safely disentangle womanhood from pregnancy while respecting the clearly gendered ways in which pregnant persons are systematically selected for substantive disadvantages. On this analysis, pregnancy discrimination is discrimination on the basis of sex not because pregnant persons are treated differently on the basis of pregnancy considered as a sex difference, in its biological meaning, but because they are systematically disadvantaged due to the social meaning of pregnant bodies—that is, *because they are pregnant persons*.

32. Thanks to Kate C.S. Schmidt for this observation.
33. I owe this label to Alice van't Hoff.
34. I'm grateful to Dee Payton for selling me on this response.

Could a proponent of the differences conception similarly respond to *Geduldig* by recognizing *pregnant persons* as a gender category? I see the appeal of the thought that perhaps a trans feminist analysis of pregnancy discrimination is readily integrable into the dominant conceptual framework of American gender equality law. For two reasons, though, I'm not hopeful that such efforts would fully succeed. First, a differences analysis of pregnancy discrimination as sex discrimination on pluralist egalitarian terms is vulnerable to a *Geduldig*-inspired defense that has frustrated the emerging law on trans discrimination: the exclusion of pregnancy coverage seems to apply to everybody—pregnant as well as nonpregnant persons—across the board, regardless of pregnancy; if it's not the case that, *but for pregnancy*, a pregnant person would have received the pregnancy coverage, then perhaps there is no differential treatment based on pregnancy to begin with. This is not a problem for an inequality theorist, who rejects the assumption that the formalistic meaning of 'discrimination' is its legally relevant meaning. Second, a differences theorist who is pluralist egalitarian about gender categories needs their own rationale for why discrimination against pregnant persons as a *gender category* constitutes discrimination on the basis of *sex*, within the biological meaning of that latter term. Again, this is not a problem for an inequality theorist, who rejects the assumption that the biological meaning of 'sex' is its legally relevant meaning.

To an extent, the trans feminist analysis of pregnancy discrimination I defend has been law, albeit not in the constitutional context. Two years after *Geduldig*, the Supreme Court extended its holding to a private employer, reasoning likewise that pregnancy discrimination is not discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964, a major federal employment discrimination statute.[35] Scandalized by the Court's decision, Congress legislatively overruled the justices' interpretation of Title VII by explicitly writing "on the basis of pregnancy" into the statute's definition of "on the basis of sex"—"The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."[36] The approach that Congress took in fixing the Court's pregnancy-exclusive interpretation of "on the basis of sex" for purposes of Title VII broadly reflects the intuition for the trans feminist analysis offered here. If a future Court is one day in a position to revisit *Geduldig*, a similar strategy may be the way forward.

35. General Electric Co. v. Gilbert, 429 U.S. 125 (1976).
36. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)).

4. Conclusion: Radical Trans Feminism

Recently in the United States, the continued, devastating fallout of the Supreme Court's decision to eviscerate the federal constitutional right to abortion has revitalized women's rights as a rallying cry for reproductive freedom. As a trans feminist, I find it disheartening that reproductive and transgender rights are routinely pitted against each other in this precarious political moment. At a recent congressional hearing, a U.S. senator tried to turn the vulnerable status of trans claims to reproductive freedom into what might have been in his mind the perfect gotcha question. "So this isn't really a women's rights issue?" asked the senator.[37]

The answer, coming from law professor Khiara Bridges, was that *of course* reproductive freedom is a women's rights issue: "We can recognize that this impacts women while also recognizing that it impacts other groups. Those things are not mutually exclusive." Monica Hesse, a *Washington Post* columnist, picked up on the subtext: the language we use to speak of pregnancy, urged Hesse, "should acknowledge the fundamental experiences that have shaped *women and pregnancy* since the beginning of time, and it should acknowledge the universal experiences of pregnancy that *transcend beyond gender*" (2022, my emphasis). Not acknowledged by Hesse's romanticization of what is in reality a consequential failure of feminist analysis and intersectional solidarity, however, are the ways in which transgender equality does not merely expand but fundamentally challenges our understanding of the meaning and requirements of gender equality.

This challenge is made apparent by the U.S. Supreme Court's analysis in *Geduldig v. Aiello* that pregnancy discrimination is not sex discrimination because pregnancy is unique but not universal to women as a gender category. Although *Geduldig* is the product of a flawed political philosophy of discrimination meeting a flawed metaphysics of sex and gender, feminist legal theorists have too often responded by contesting only the political philosophy, finding the sex discrimination in the "direct" way that pregnancy is thought to connect to womanhood and thus sex. Unfortunately, the attempt to find pregnancy discrimination in specific body parts works ideologically only to further disappear from view the political and social inequality that masks itself as biology proper; on a practical level, it then alienates those who have as much of a personal stake in

37. A videotape of the exchange is available on the senator's website: https://www.hawley.senate.gov/watch-far-left-berkeley-law-professor-melts-down-when-senator-hawley-asks-her-if-men-can-get. The senator, now apparently an ally of women's rights, had just successfully urged the Court to dismantle constitutional protections for abortion. See Amicus Brief of Senators Josh Hawley, Mike Lee, and Ted Cruz in Support of Petitioners, Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) (No. 19-1392).

confronting the unequal social meaning of sex—sometimes without certain body parts—while legitimizing the voices of those who themselves participate in the reproduction of that unequal social meaning—despite having the relevant body parts.

So long as feminists continue to reduce sex discrimination to differential treatment based on a purported biological difference, we are still holding onto a political strategy that has long been used to obscure and rationalize gender inequality. Trans-inclusive feminism aims merely to retrofit trans people into existing cis-centric feminist frameworks; trans feminism, drawing on radical feminist insights, moves beyond apparent sex differences to interrogate the social meaning of bodies taken for granted by the dominant world. On a trans feminist analysis, when a pregnant person is discriminated against because of pregnancy (properly understood, a social rather than biological status) they are discriminated against *as a pregnant person*—that is, directly and immediately, a case of sex discrimination.[38]

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38. Carolyn Aiello, Sally Armendariz, Jacqueline Jaramillo, and Elizabeth Johnson were the named plaintiffs in the lawsuits that became *Geduldig v. Aiello*; this essay is dedicated to them. Special thanks to Sara Aronowitz, without whom I wouldn't have thought this was an idea I could pursue, and to Suzanne Dovi and Katie Zhou, without whom I wouldn't have made this far. For feedback, discussions, and much-needed support along the way, I'm beyond grateful to Sophia Arbeiter, Ásta, Rowan Bell, Sara Bernstein, Rhys Borchert, Thomas Christiano, Samantha J. Christopher, Evangelian Collings, Luke Golemon, Alex M. K. Hagen, Veronika Hammond, Sally Haslanger, Timothy Kearl, Elizabeth Levinson, Ashley Lindsley-Kim, Michael McKenna, Will Moorfoot, Joan O'Bryan, Dee Payton, Carolina Sartorio, Kate C.S. Schmidt, Anna-Bella Sicilia, Houston Smit, Jason Turner, Alice van't Hoff, Jonathan Weinberg, Karolina Wisniewska, Fiona Woollard, Ke Zhang, Yili Zhou, and two incredibly thoughtful referees for this journal; *Signs*' Managing Editor, Miranda Outman, whose sharp, thorough, and careful editing has made this essay infinitely more accessible; audiences at the 2023 Central Division meeting of the American Philosophical Association and the 2023 Harvard-MIT Graduate Conference in Philosophy; and my wonderful students in Spring and Fall 2022's Logic in Law as well as members of a graduate seminar on philosophical methodology, the feminist philosophy reading group, the political philosophy reading group, and the undergraduate philosophy club at the University of Arizona.

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